

Case No. 2:20-cv-03583-BMS

STEWART SMITH, individually and  
on behalf of all others similarly situated,

Plaintiff,

vs.

DIRECT BUILDING SUPPLIES LLC;  
and DOES 1 through 10, inclusive, and  
each of them,

Defendant.

**CLASS ACTION**

**SECOND AMENDED COMPLAINT  
FOR VIOLATIONS OF:**

1. NEGLIGENT VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(b)]
2. WILLFUL VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(b)]
3. NEGLIGENT VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(c)]
4. WILLFUL VIOLATIONS  
OF THE TELEPHONE  
CONSUMER PROTECTION  
ACT [47 U.S.C. §227(c)]

**DEMAND FOR JURY TRIAL**

-1-

1 Plaintiff STEWART SMITH (“Plaintiff”), individually and on behalf of all  
2 others similarly situated, alleges the following against Defendant DIRECT  
3 BUILDING SUPPLIES LLC (“Defendant”) upon information and belief based  
4 upon personal knowledge:

#### 5 **NATURE OF THE CASE**

6 1. Plaintiff brings this action individually and on behalf of all others  
7 similarly situated seeking damages and any other available legal or equitable  
8 remedies resulting from the illegal actions of DIRECT BUILDING SUPPLIES  
9 LLC (“Defendant”), in negligently, knowingly, and/or willfully contacting Plaintiff  
10 on Plaintiff’s cellular telephone in violation of the Telephone Consumer Protection  
11 Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) and related regulations, specifically the  
12 National Do-Not-Call provisions, thereby invading Plaintiff’s privacy.

#### 13 **JURISDICTION & VENUE**

14 2. Jurisdiction is proper under 28 U.S.C. § 1331 because this matter  
15 arises out of a question of federal law—namely, the Telephone Consumer  
16 Protection Act.

17 3. Venue is proper in the United States District Court for the Eastern  
18 District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) and because Defendant  
19 does business within the State of Pennsylvania and Plaintiff resides within the  
20 County of Montgomery.

#### 21 **PARTIES**

22 4. Plaintiff, STEWART SMITH (“Plaintiff”), is a natural person residing  
23 in Montgomery County in the state of Pennsylvania and is a “person” as defined  
24 by 47 U.S.C. § 153 (39).

25 5. Defendant, DIRECT BUILDING SUPPLIES LLC (“Defendant”) is a  
26 construction and home contracting company and is a “person” as defined by 47  
27 U.S.C. § 153 (39).

28 6. The above named Defendant, and its subsidiaries and agents, are

collectively referred to as “Defendants.” The true names and capacities of the Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendants designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendants. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendants.

### **FACTUAL ALLEGATIONS**

8. On or about October 4, 2019, Defendants or an agent acting on Defendant’s behalf contacted Plaintiff on Plaintiff’s cellular telephone number ending in -6860, in an attempt to solicit Plaintiff to purchase Defendant’s services.

9. During the call on or about October 4, 2019, there was a noticeable pause and delay before Defendants came on the line and the call was of an impersonal nature as Plaintiff had no prior relationship to Defendants.

10. Once Plaintiff was connected with a representative, the representative informed Plaintiff that he was calling on behalf of ReNu Solar and that Plaintiff should expect a further call from ReNu Solar regarding Defendant’s interest in soliciting its home solar to him.

11. ReNu Solar, ReNu, ReNu Solar and Roofing, and Home ReNu are all registered DBAs of Defendant Direct Building Supplies LLC.

12. Accordingly, the call was either placed directly by Defendants or was placed by an agent of Defendant hired to place such calls for the benefit of

1 Defendant.

2 13. Defendants or its agent additionally called Plaintiff on or about  
3 October 6, 2019, November 1, 2019, January 17, 2020, and January 21, 2020.  
4 Similar to the October 4, 2019, there was a noticeable pause or delay before  
5 Defendants came on the line when Plaintiff answered these calls.

6 14. On these calls, a representative eventually came on the line and again  
7 informed Plaintiff that the calls was on behalf of ReNu Solar and it was for the  
8 purposes of soliciting Plaintiff to purchase home solar.

9 15. After the call on November 1, 2019, Plaintiff additionally received an  
10 email from Logan Misiti whose signature indicated he was a leads manager for  
11 ReNu Solar and Roofing, further confirming that these calls were placed either  
12 directly by Defendant or on behalf of Defendant.

13 16. These facts are indicative that the calls used an “automatic telephone  
14 dialing system” as defined by *47 U.S.C. § 227(a)(1)* to place the call to Plaintiff  
15 seeking to solicit its services, because of the impersonal nature and noticeable  
16 existence of a pause.

17 17. In particular, the pause is indicative of a predictive dialer which uses  
18 a random or sequential number generator to index and parse the telephone number  
19 data, in order to store it in temporary cache ram memory. A random or sequential  
20 number generator is then used to produce the stored telephone numbers from  
21 storage to the dialing platform for purposes. The dialing platform is  
22 preprogrammed to dial at specific rate, time, and interval, using algorithmic dialing  
23 systems, to maximize the efficiency of the system in reaching as many consumers  
24 who pick up calls as possible. These calls are happening in the background of the  
25 system, with only a percentage of them resulting in a live person picking up, and  
26 the noticeable delay is caused by the delay in the system that is blasting out calls  
27 being connected to an available agent. Plaintiff alleges that the system used by  
28 Defendant or its agent is this sort of predictive dialer.

1 18. Defendants' calls to Plaintiff constituted calls that were not for  
2 emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A).

3 19. During all relevant times, Defendants did not possess Plaintiff's "prior  
4 express consent" to receive calls using an automatic telephone dialing system or an  
5 artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. §  
6 227(b)(1)(A).

7 20. Defendants used an "automatic telephone dialing system" as defined  
8 by 47 U.S.C. § 227(a)(1) to place its call to Plaintiff seeking to solicit its services.

9 21. Further, Plaintiff's cellular telephone number ending in -6860 was  
10 added to the National Do-Not-Call Registry on June 11, 2010, well over thirty (30)  
11 days prior to Defendant's initial call.

12 22. Plaintiff only uses his cell phone and it is the only type of telephone  
13 he had in use at the time at his home.

14 23. Accordingly, Plaintiff's cellular phone is a residential line subject to  
15 the protections of the National Do-Not-Call List.

16 24. Defendants placed multiple calls soliciting its business to Plaintiff on  
17 his cellular telephone ending in -6860 during the time period of October 2019 to  
18 January 2020.

19 25. Such calls constitute solicitation calls pursuant to 47 C.F.R. §  
20 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

21 26. Plaintiff received numerous solicitation calls from Defendant within a  
22 12-month period.

23 27. Defendants called Plaintiff in an attempt to solicit its services and in  
24 violation of the National Do-Not-Call provisions of the TCPA.

25 28. Upon information and belief, and based on Plaintiff's experiences of  
26 being called by Defendant after being on the National Do-Not-Call list for several  
27 years prior to Defendants' initial call, and at all relevant times, Defendants failed  
28 to establish and implement reasonable practices and procedures to effectively

1 prevent telephone solicitations in violation of the regulations prescribed under 47  
2 U.S.C. § 227(c)(5).

### 3 CLASS ALLEGATIONS

4 29. Plaintiff brings this action individually and on behalf of all others  
5 similarly situated, as a member the two proposed classes (hereafter, jointly, “The  
6 Classes”).

7 30. The class concerning the ATDS claim (hereafter “The ATDS Class”)  
8 is defined as follows:

9 All persons within the United States who received any  
10 solicitation/telemarketing telephone calls from  
11 Defendant or its agent to said person’s cellular telephone  
12 for whom Defendant has no record of prior express  
13 consent for such calls within the four years prior to the  
14 filing of this Complaint.

15 31. The class concerning the National Do-Not-Call violation (hereafter  
16 “The DNC Class”) is defined as follows:

17 All persons within the United States registered on the  
18 National Do-Not-Call Registry for at least 30 days who  
19 received more than one call made by or on behalf of  
20 Defendant that promoted Defendant’s products or  
21 services, within any twelve-month period, within four  
22 years prior to the filing of the complaint.

23 32. Plaintiff represents, and is a member of, The ATDS Class, consisting  
24 of all persons within the United States who received any solicitation/telemarketing  
25 telephone calls from Defendant or its agent to said person’s cellular telephone for  
26 whom Defendant has no record of prior express consent for such calls within the  
27 four years prior to the filing of this Complaint.

28 33. Plaintiff represents, and is a member of, The DNC Class, consisting  
of all persons within the United States registered on the National Do-Not-Call

1 Registry for at least 30 days who received more than one call made by or on behalf  
2 of Defendant that promoted Defendant's products or services, within any twelve-  
3 month period, within four years prior to the filing of the complaint.

4 34. Defendant, its employees and agents are excluded from The Classes.  
5 Plaintiff does not know the number of members in The Classes, but believes the  
6 Classes members number in the thousands, if not more. Thus, this matter should  
7 be certified as a Class Action to assist in the expeditious litigation of the matter.

8 35. The Classes are so numerous that the individual joinder of all of its  
9 members is impractical. While the exact number and identities of The Classes  
10 members are unknown to Plaintiff at this time and can only be ascertained through  
11 appropriate discovery, Plaintiff is informed and believes and thereon alleges that  
12 The Classes includes thousands of members. Plaintiff alleges that The Classes  
13 members may be ascertained by the records maintained by Defendant.

14 36. Plaintiff and members of The ATDS Class were harmed by the acts of  
15 Defendant in at least the following ways: Defendant illegally contacted Plaintiff  
16 and ATDS Class members via their cellular telephones thereby causing Plaintiff  
17 and ATDS Class members to incur certain charges or reduced telephone time for  
18 which Plaintiff and ATDS Class members had previously paid by having to retrieve  
19 or administer messages left by Defendant during those illegal calls, and invading  
20 the privacy of said Plaintiff and ATDS Class members.

21 37. Common questions of fact and law exist as to all members of The  
22 ATDS Class which predominate over any questions affecting only individual  
23 members of The ATDS Class. These common legal and factual questions, which  
24 do not vary between ATDS Class members, and which may be determined without  
25 reference to the individual circumstances of any ATDS Class members, include,  
26 but are not limited to, the following:

- 27 a. Whether, within the four years prior to the filing of this  
28 Complaint, Defendant made any telemarketing/solicitation call



1 to an ATDS Class member using any automatic telephone  
2 dialing system or any artificial or prerecorded voice to any  
3 telephone number assigned to a cellular telephone service;

4 b. Whether Plaintiff and the ATDS Class members were damaged  
5 thereby, and the extent of damages for such violation; and

6 c. Whether Defendant should be enjoined from engaging in such  
7 conduct in the future.

8 38. As a person that received numerous telemarketing/solicitation calls  
9 from Defendant for whom Defendant has no record of prior express consent for  
10 such calls, Plaintiff is asserting claims that are typical of The ATDS Class.

11 39. Plaintiff and members of The DNC Class were harmed by the acts of  
12 Defendant in at least the following ways: Defendant illegally contacted Plaintiff  
13 and DNC Class members via their telephones for solicitation purposes, thereby  
14 invading the privacy of said Plaintiff and the DNC Class members whose telephone  
15 numbers were on the National Do-Not-Call Registry. Plaintiff and the DNC Class  
16 members were damaged thereby.

17 40. Common questions of fact and law exist as to all members of The  
18 DNC Class which predominate over any questions affecting only individual  
19 members of The DNC Class. These common legal and factual questions, which do  
20 not vary between DNC Class members, and which may be determined without  
21 reference to the individual circumstances of any DNC Class members, include, but  
22 are not limited to, the following:

23 a. Whether, within the four years prior to the filing of this  
24 Complaint, Defendant or its agents placed more than one  
25 solicitation call to the members of the DNC Class whose  
26 telephone numbers were on the National Do-Not-Call Registry;

27 b. Whether Defendant obtained prior express written consent to  
28 place solicitation calls to Plaintiff or the DNC Class members'



1                   telephones;

2           c.     Whether Plaintiff and the DNC Class member were damaged  
3               thereby, and the extent of damages for such violation; and

4           d.     Whether Defendant and its agents should be enjoined from  
5               engaging in such conduct in the future.

6           41.    As a person that received numerous solicitation calls from Defendant  
7               within a 12-month period, Plaintiff is asserting claims that are typical of the DNC  
8               Class.

9           42.    Plaintiff will fairly and adequately protect the interests of the members  
10           of The Classes. Plaintiff has retained attorneys experienced in the prosecution of  
11           class actions.

12           43.    A class action is superior to other available methods of fair and  
13           efficient adjudication of this controversy, since individual litigation of the claims  
14           of all Classes members is impracticable. Even if every Classes member could  
15           afford individual litigation, the court system could not. It would be unduly  
16           burdensome to the courts in which individual litigation of numerous issues would  
17           proceed. Individualized litigation would also present the potential for varying,  
18           inconsistent, or contradictory judgments and would magnify the delay and expense  
19           to all parties and to the court system resulting from multiple trials of the same  
20           complex factual issues. By contrast, the conduct of this action as a class action  
21           presents fewer management difficulties, conserves the resources of the parties and  
22           of the court system, and protects the rights of each Classes member.

23           44.    The prosecution of separate actions by individual Classes members  
24           would create a risk of adjudications with respect to them that would, as a practical  
25           matter, be dispositive of the interests of the other Classes members not parties to  
26           such adjudications or that would substantially impair or impede the ability of such  
27           non-party Class members to protect their interests.

28           45.    Defendant has acted or refused to act in respects generally applicable

1 to The Classes, thereby making appropriate final and injunctive relief with regard  
2 to the members of the Classes as a whole.

3 **FIRST CAUSE OF ACTION**

4 **Negligent Violations of the Telephone Consumer Protection Act**

5 **47 U.S.C. §227(b).**

6 **On Behalf of the ATDS Class**

7 46. Plaintiff repeats and incorporates by reference into this cause of action  
8 the allegations set forth above at Paragraphs 1-39.

9 47. The foregoing acts and omissions of Defendants constitute numerous  
10 and multiple negligent violations of the TCPA, including but not limited to each  
11 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular  
12 *47 U.S.C. § 227 (b)(1)(A)*.

13 48. As a result of Defendants' negligent violations of *47 U.S.C. § 227(b)*,  
14 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory  
15 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

16 49. Plaintiff and the ATDS Class members are also entitled to and seek  
17 injunctive relief prohibiting such conduct in the future.

18 **SECOND CAUSE OF ACTION**

19 **Knowing and/or Willful Violations of the Telephone Consumer Protection**  
20 **Act**

21 **47 U.S.C. §227(b)**

22 **On Behalf of the ATDS Class**

23 50. Plaintiff repeats and incorporates by reference into this cause of action  
24 the allegations set forth above at Paragraphs 1-39.

25 51. The foregoing acts and omissions of Defendants constitute numerous  
26 and multiple knowing and/or willful violations of the TCPA, including but not  
27 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*,  
28 and in particular *47 U.S.C. § 227 (b)(1)(A)*.

52. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

53. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

### **THIRD CAUSE OF ACTION**

#### **Negligent Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(c)**

#### **On Behalf of the DNC Class**

54. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-39.

55. The foregoing acts and omissions of Defendants constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227(c), and in particular 47 U.S.C. § 227 (c)(5).

56. As a result of Defendants' negligent violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class Members are entitled an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B).

57. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

### **FOURTH CAUSE OF ACTION**

#### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227 et seq.**

#### **On Behalf of the DNC Class**

58. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-39.

59. The foregoing acts and omissions of Defendants constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, in particular *47 U.S.C. § 227 (c)(5)*.

60. As a result of Defendants' knowing and/or willful violations of *47 U.S.C. § 227(c)*, Plaintiff and the DNC Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(c)(5)*.

61. Plaintiff and the DNC Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

### **FIRST CAUSE OF ACTION**

#### **Negligent Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(b)**

- As a result of Defendant's negligent violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to *47 U.S.C. 227(b)(3)(B)*.
- Any and all other relief that the Court deems just and proper.

### **SECOND CAUSE OF ACTION**

#### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

#### **47 U.S.C. §227(b)**

- As a result of Defendant's willful and/or knowing violations of *47 U.S.C. §227(b)(1)*, Plaintiff and the ATDS Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to *47 U.S.C.*

§227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).

- Any and all other relief that the Court deems just and proper.

### **THIRD CAUSE OF ACTION**

#### **Negligent Violations of the Telephone Consumer Protection Act**

##### **47 U.S.C. §227(c)**

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).
- Any and all other relief that the Court deems just and proper.

### **FOURTH CAUSE OF ACTION**

#### **Knowing and/or Willful Violations of the Telephone Consumer Protection**

##### **Act**

##### **47 U.S.C. §227(c)**

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiff and the DNC Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(c)(5).
- Any and all other relief that the Court deems just and proper.

62. Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully Submitted this 20th Day of October, 2021.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s/ Thomas E. Wheeler  
Thomas E. Wheeler (*pro hac vice*)  
Cynthia Z. Levin, Esq. (Bar No. 27050)

1 LAW OFFICES OF TODD M.  
2 FRIEDMAN, P.C.  
3 21031 Ventura Blvd, Suite 340  
4 Woodland Hills, CA 91364  
5 Phone: 323-306-4234  
6 Fax: 866-633-0228  
7 twheeler@toddfllaw.com  
8 *Attorneys for Plaintiff*  
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1 Filed electronically on this 20th Day of October, 2021, with:

2 United States District Court CM/ECF system.

3 Notification sent electronically on this 20th Day of October, 2021, to:

4 Honorable Berle M. Schiller

5 United States District Court

6 Eastern District of Pennsylvania

7 And All Counsel of Record as Recorded On The Electronic Service List

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9  
10 /s/ Thomas E. Wheeler, Esq.

11 THOMAS E. WHEELER  
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